

ASSEMBLY BILL

No. 440

Introduced by Assembly Member Gatto

February 15, 2013

An act to add Chapter 6.10 (commencing with Section 25403) to Division 20 of the Health and Safety Code, relating to hazardous substances.

LEGISLATIVE COUNSEL'S DIGEST

AB 440, as introduced, Gatto. Hazardous substances: releases: local agency cleanup or remedy.

Existing law dissolved redevelopment agencies and community development agencies, as of February 1, 2012, and provides for the designation of successor agencies, as defined. Existing law requires successor agencies to wind down the affairs of the dissolved redevelopment agencies and to, among other things, perform obligations required pursuant to any enforceable obligation, including, but not limited to, any obligations under the Polanco Redevelopment Act to remedy or remove the release of hazardous substances within a project area consistent with state and federal laws, as specified.

Existing law, the Carpenter-Presley-Tanner Hazardous Substance Account Act, imposes liability for hazardous substance removal or remedial actions and requires the Department of Toxic Substances Control to adopt, by regulation, criteria for the selection and for the priority ranking of hazardous substance release sites for removal or remedial action under the act.

This bill would authorize a local agency to take any action similar to that under the Polanco Redevelopment Act that the local agency determines is necessary, consistent with other state and federal laws,

to remedy or remove a release of hazardous substances within the boundaries of the local agency, pursuant to the procedures specified in the bill.

The bill would require the Department of Toxic Substances Control and the California regional water quality control board to adopt and post cleanup guidelines for the taking of a remedial and removal action. A local agency would be required to submit for approval a cleanup plan to the regional board or a remedial action plan to the department before taking action. The bill would allow the local agency to take those remedial or removal actions only under specified conditions with regard to the responsible party for the release, unless the local agency is taking action to investigate or conduct feasibility studies concerning a release or determines that conditions require immediate action.

The bill would allow the local agency to designate another agency, in lieu of the department or the regional board, to review and approve a cleanup plan or remedial action plan and to oversee the remediation or removal of hazardous substances from a hazardous substance release site, under certain conditions. The bill would immunize a local agency that remedies or removes a hazardous substance release, pursuant to those provisions, from liability under specified state laws, if the action is in accordance with a cleanup plan or remedial action plan prepared by a qualified independent contractor, as defined, and approved by the department, a regional board, or the designated agency, and the remedial or removal action is undertaken and properly completed. The bill would authorize the recovery by a local agency of cleanup and remedial costs from the liable party.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Chapter 6.10 (commencing with Section 25403)
- 2 is added to Division 20 of the Health and Safety Code, to read:
- 3
- 4 CHAPTER 6.10. HAZARDOUS SUBSTANCE RELEASE CLEANUP
- 5
- 6 25403. For purposes of this article, the following terms shall
- 7 have the following meanings:

1 (a) “CUPA” means the Certified Unified Program Agency
2 certified to implement the unified program pursuant to Chapter
3 6.11 (commencing with Section 25404).

4 (b) “Department” means the Department of Toxic Substances
5 Control.

6 (c) “Designated agency” means an agency designated by the
7 local agency pursuant to paragraph (1) or (2) of subdivision (d) of
8 Section 25403.1.

9 (d) “Director” means the Director of Toxic Substances Control.

10 (e) “Hazardous substance” means a hazardous substance as
11 defined in subdivision (h) of Section 25281, and any reference to
12 hazardous substance in the definitions referenced in this section
13 shall be deemed to refer to hazardous substance, as defined in this
14 subdivision.

15 (f) “Local agency” means a county, a city, or a housing
16 authority, as provided in Section 34240.

17 (g) “Person” means an individual, trust, firm, joint stock
18 company, business concern, partnership, limited liability company,
19 association, and corporation, including, but not limited to, a
20 government corporation. “Person” also includes any local agency,
21 county, district, commission, the state or any department, agency,
22 or political subdivision thereof, any interstate body, and the federal
23 government or any department or agency thereof to the extent
24 permitted by law.

25 (h) “Phase I environmental assessment” has the same meaning
26 as defined in Section 25200.14, except with respect to a hazardous
27 substance.

28 (i) “Qualified independent contractor” means an independent
29 contractor who is any of the following:

30 (1) An engineering geologist who is certified pursuant to Section
31 7842 of the Business and Professions Code.

32 (2) A geologist who is registered pursuant to Section 7850 of
33 the Business and Professions Code.

34 (3) A civil engineer who is registered pursuant to Section 6762
35 of the Business and Professions Code.

36 (j) “Regional board” means a California regional water quality
37 control board.

38 (k) “Release” means any spilling, leaking, pumping, pouring,
39 emitting, emptying, discharging, injecting, escaping, leaching,
40 dumping, or disposing into the environment.

1 (l) (1) “Remedy” or “remove” means an action to assess,
2 evaluate, investigate, monitor, remove, correct, clean up, or abate
3 a release of a hazardous substance or to develop plans for those
4 actions.

5 (2) “Remedy” includes all of the following:

6 (A) Those actions that are consistent with a permanent remedy,
7 that are taken instead of, or in addition to, removal actions in the
8 event of a release or threatened release of a hazardous substance
9 into the environment. “Remedy” also includes those actions
10 specified in Section 9601 of Title 42 of the United States Code,
11 except that any reference in Section 9601 of Title 42 of the United
12 States Code to the President, relating to determinations regarding
13 the relocation of residents, businesses, and community facilities
14 shall, for the purposes of this chapter, be deemed to be a reference
15 to the Governor, and any other reference in that section to the
16 President shall, for the purposes of this chapter, be deemed a
17 reference to the Governor, or the director, if designated by the
18 Governor.

19 (B) Those actions that are necessary to monitor, assess, and
20 evaluate a release or a threatened release of a hazardous substance.

21 (C) Site operation and maintenance.

22 (3) “Remove” includes the cleanup or removal of released
23 hazardous substances from the environment or the taking of other
24 actions as may be necessary to prevent, minimize, or mitigate
25 damage that may otherwise result from a release or threatened
26 release. “Remove” includes those actions specified in Section 9601
27 of Title 42 of the United States Code.

28 (m) “Responsible party” means a person described in subdivision
29 (a) of Section 25323.5 of this code or subdivision (a) of Section
30 13304 of the Water Code.

31 (n) “State board” means the State Water Resources Control
32 Board.

33 25403.1. (a) (1) A local agency may take any action that the
34 local agency determines is necessary and that is consistent with
35 other state and federal laws to remedy or remove a release of
36 hazardous substances on, under, or from property within a local
37 agency’s boundaries, whether the local agency owns that property
38 or not, in accordance with the requirements of this chapter. When
39 taking action pursuant to this chapter, if the local agency does not
40 own property that is the subject of the removal or remedial action,

1 the local agency has the right of entry upon that property, if, upon
2 providing notice to the owner of that property, the owner of the
3 property does not respond to the notice.

4 (2) The department and regional board shall adopt and post on
5 that agency's Internet Web site general cleanup guidelines with
6 regard to taking action to remedy or remove a release pursuant to
7 this chapter.

8 (3) The adoption and posting of general cleanup guidelines
9 pursuant to this section shall not be deemed the adoption of a
10 regulation for purposes of Chapter 3.5 (commencing with Section
11 11340) of Part 1 of Division 3 of Title 2 of the Government Code
12 and shall be exempt from those provisions.

13 (4) A local agency shall, before taking action to remedy or
14 remove the release, do both of the following:

15 (A) Have a remedial action plan or cleanup plan prepared,
16 pursuant to those guidelines, by an independent qualified
17 contractor.

18 (B) Submit a cleanup plan to the regional board or a remedial
19 action plan to the department for approval.

20 (5) The regional board or the department shall respond to the
21 local agency's request for approval of a cleanup plan or remedial
22 action plan within 60 days of the receipt of the plan.

23 (6) Within 60 days after approval of the cleanup plan or remedial
24 action plan, pursuant to applicable statutes and regulations, the
25 director, or the regional board, as appropriate, shall acknowledge,
26 in writing, that upon proper completion of the remedial or removal
27 action in accordance with the plan, the immunity provided by
28 Section 25403.2 shall apply to the local agency.

29 (7) The local agency shall notify the department and local health
30 and building departments and the regional board, of any cleanup
31 activity pursuant to this section at least 30 days before the
32 commencement of the activity.

33 (8) If an action taken by a local agency or a responsible party
34 to remedy or remove a release of a hazardous substance does not
35 meet, or is not consistent with, a cleanup plan approved by the
36 regional board or a remedial action plan approved by the
37 department, the department or the regional board that approved
38 the cleanup plan or remedial action plan may require the local
39 agency to take, or cause the taking of, additional action to remedy
40 or remove the release, as provided by applicable law.

1 (9) If an administering agency for the site has been designated
2 pursuant to Section 25262, the department or the regional board
3 may impose any requirements for additional action pursuant to
4 paragraph (8) only as provided in Sections 26263 and 25265.

5 (10) If methane or landfill gas is present, the local agency shall
6 obtain written approval from the Department of Resources
7 Recycling and Recovery prior to taking action authorized under
8 this subdivision.

9 (b) Except as provided in subdivision (c), a local agency may
10 take the actions specified in subdivision (a) only under one of the
11 following conditions:

12 (1) There is no responsible party for the release identified by
13 the local agency.

14 (2) Both of the following apply:

15 (A) A party determined by the local agency to be a responsible
16 party for the release has been notified by the local agency, or has
17 received adequate notice from the department, a regional board,
18 the California Environmental Protection Agency, or other
19 governmental agency with relevant authority, and has been given
20 60 days to respond and to propose a remedial action plan and
21 schedule.

22 (B) The responsible party specified in subparagraph (A) has not
23 agreed within an additional 60 days to implement a plan and
24 schedule to remedy or remove the release that meets both of the
25 following requirements:

26 (i) The plan and schedule are acceptable to the local agency.

27 (ii) The local agency makes a finding that the plan and schedule
28 are consistent with the intended use of the property.

29 (3) (A) The party determined by the local agency to be the
30 responsible party for the hazardous substance release entered into
31 an agreement with the local agency to prepare a remedial action
32 plan or cleanup plan for approval by the department, the regional
33 board, or the appropriate local agency, and to implement the
34 remedial action plan or cleanup plan in accordance with an agreed
35 schedule, but failed to do any of the following:

36 (i) Prepare the remedial action plan or cleanup plan.

37 (ii) Implement the remedial action plan or cleanup plan in
38 accordance with the agreed schedule.

39 (iii) Otherwise failed to carry out the remedial action in an
40 appropriate and timely manner.

1 (B) An action taken by the local agency pursuant to this
2 paragraph shall be consistent with any agreement between the local
3 agency and the responsible party and with the requirements of the
4 state agency or the local agency that approved or will approve the
5 remedial action plan or cleanup plan and is overseeing or will
6 oversee the preparation and implementation of the remedial action
7 plan.

8 (c) Subdivision (b) does not apply to either of the following:

9 (1) A local agency taking actions to investigate or conduct
10 feasibility studies concerning a release.

11 (2) A local agency taking the actions specified in subdivision
12 (a) if the local agency determines that conditions require immediate
13 action.

14 (d) (1) A local agency may designate another agency, in lieu
15 of the department or the regional board, to review and approve a
16 cleanup plan or a remedial action plan and to oversee the
17 remediation or removal of hazardous substances from a specific
18 hazardous substance release site if the agency is designated as the
19 administering agency under Section 25262. In that event, the
20 designated agency shall conduct the oversight of the remedial
21 action in accordance with Chapter 6.65 (commencing with Section
22 25260), and all provisions of that chapter shall apply to the
23 remedial action.

24 (2) A local agency may designate another agency to review and
25 approve a cleanup plan or a remedial action plan for a site and
26 oversee the remediation and removal action at the site if all of the
27 following conditions exist:

28 (A) The designated agency is certified as a CUPA.

29 (B) The site is an underground storage tank site subject to
30 Chapter 6.7 (commencing with Section 25280).

31 (C) The designated agency is certified pursuant to Section
32 25297.01 and the state board has entered into an agreement with
33 that agency pursuant to Section 25297.1.

34 (D) The designated agency determines that the site is within the
35 guidelines and protocols established in, and pursuant to, the
36 agreement specified in subparagraph (C).

37 (E) The designated agency consents to the designation.

38 (3) Within 60 days after approving a cleanup plan or a remedial
39 action plan pursuant to paragraph (1) or (2), the designated agency
40 shall issue a notice that, upon proper completion of the remedial

1 or removal action plan, the immunity specified in Section 25403.2
2 shall apply to the local agency. If the designated agency was
3 formed by the local agency, the cleanup plan or remedial action
4 plan shall also be subject to the approval of the department or
5 regional board.

6 (4) (A) An agency may not consent to the designation pursuant
7 to paragraph (1) or (2) unless the designated agency determines
8 that it has adequate staff resources and the requisite technical
9 expertise and capabilities available to adequately supervise the
10 remedial action.

11 (B) If an agency has been designated pursuant to paragraph (2),
12 the department or a regional board may require the designated
13 agency withdraw from the designation or stop taking that action,
14 after providing the designated agency with adequate notice, if both
15 of the following conditions are met:

16 (i) The department or a regional board determines that the
17 agency's designation was not consistent with paragraph (2), or
18 makes one of the findings specified in subdivision (d) of Section
19 101480.

20 (ii) The department or a regional board determines that it has
21 adequate staff resources and capabilities available to adequately
22 supervise the remedial action, and assumes that responsibility.

23 (C) This paragraph does not prevent a regional board from taking
24 an action pursuant to Division 7 (commencing with Section 13000)
25 of the Water Code.

26 (5) If an agency has been designated pursuant to paragraph (1)
27 or (2), the designated agency may, after providing the local agency
28 with adequate notice, withdraw from its designation or stop taking
29 action after making one of the findings specified in subdivision
30 (d) of Section 101480.

31 (e) (1) To facilitate remedial planning, the local agency may
32 require the owner or operator of a site within the local agency's
33 jurisdictional boundaries to provide the local agency with all
34 existing environmental information pertaining to the site, including
35 the results of any phase I or subsequent environmental assessment,
36 any assessment conducted pursuant to an order from, or agreement
37 with, any federal, state, or local agency, and any other
38 environmental assessment information, except that which is
39 determined to be privileged.

(2) A person requested to furnish the information pursuant to paragraph (1) shall be required only to furnish that information that may be within that person's possession or control, including actual knowledge of information within the possession or control of any other party. If environmental assessment information is not available, the local agency may require the owner of the property to conduct, and to pay the expenses of conducting, an assessment in accordance with standard real estate practices for conducting phase I or phase II environmental assessments.

25403.2. (a) (1) Notwithstanding any other law, except as otherwise provided in this chapter, a local agency that undertakes and completes an action, or causes another person to undertake and complete an action pursuant to Section 25403.1 for which a finding of completion is made pursuant to subdivision (b), to remedy or remove a hazardous substance release on, under, or from property the local agency's boundaries, in accordance with a cleanup plan or remedial action plan prepared by a qualified independent contractor and approved by the department, a regional board, or the designated agency, in accordance with Section 25403.1 is not liable, with respect to that release only, pursuant to any of the following:

(A) Division 7 (commencing with Section 13000) of the Water Code.

(B) Chapter 6.5 (commencing with Section 25100), Chapter 6.7 (commencing with Section 25280), Chapter 6.75 (commencing with Section 25299.10), or Chapter 6.8 (commencing with Section 25300), of Division 20.

(C) Any other state or local law imposing liability for remedial or removal actions to releases of hazardous substances.

(2) If the remedial action was also performed pursuant to Chapter 6.65 (commencing with Section 25260) of Division 20, and a certificate of completion is issued pursuant to subdivision (b) of Section 25264, the immunity from local agency action provided by the certificate of completion, as specified in subdivision (c) of Section 25264, shall apply to the local agency, in addition to the immunity conferred by this section.

(3) In the case of a remedial action performed pursuant to Chapter 6.65 (commencing with Section 25260) of Division 20, and for which the administering agency is a local agency, the limitations on the certificate of completion set forth in paragraphs

1 (1) to (6), inclusive, of subdivision (c) of Section 25264 are limits
2 on any immunity provided for by this section and subdivision (c)
3 of Section 25264.

4 (b) Notwithstanding any provision of law or policy providing
5 for certification by a person conducting a remedial or removal
6 action that the action has been properly completed, a determination
7 that a remedial or removal action has been properly completed
8 pursuant to this section shall be made only upon the affirmative
9 approval of the director, the regional board, or the designated
10 agency, as appropriate. The department or regional board, as
11 appropriate, shall, within 60 days of the date it finds that a remedial
12 or removal action has been completed, notify the local agency in
13 writing that the immunity provided by this section is in effect. If
14 another agency is designated to oversee the remedial or removal
15 action pursuant to paragraph (1) or (2) of subdivision (d) of Section
16 25403.1, the designated agency shall issue a notice within 60 days
17 of the date it finds that a remedial or removal action has been
18 completed.

19 (c) Upon proper completion of a remedial or removal action,
20 as specified in subdivision (b), the immunity from action provided
21 by the certificate of completion provided pursuant to subdivision
22 (c) of Section 25264 and the immunity provided by this section
23 extends to all of the following, but only for the release or releases
24 specifically identified in the approved cleanup or remedial action
25 plan and not for any subsequent release or any release not
26 specifically identified in the approved cleanup plan or remedial
27 action plan:

28 (1) An employee or agent of the local agency, including an
29 instrumentality of the local agency authorized to exercise some,
30 or all, of the powers of a local agency within, or for the benefit of,
31 a local agency and an employee or agent of the instrumentality.

32 (2) A person that enters into an agreement with a local agency
33 for the development of property, if the agreement requires the
34 person to acquire property affected by a hazardous substance
35 release or to remove or remedy a hazardous substance release with
36 respect to that property.

37 (3) A person that acquires the property after a person has entered
38 into an agreement with a local agency for development of the
39 property, as described in paragraph (2).

1 (4) A person that provides financing to a person specified in
2 paragraph (2) or (3).

3 (d) Notwithstanding any other law, the immunity provided by
4 this section does not extend to any of the following:

5 (1) A person that was a responsible party for the release before
6 entering into an agreement, acquiring property, or providing
7 financing, as specified in subdivision (c).

8 (2) A person specified in subdivision (a) or (c) for any
9 subsequent release of a hazardous substance or any release of a
10 hazardous substance not specifically identified in the approved
11 cleanup plan or remedial action plan.

12 (3) A contractor who prepares the cleanup plan or remedial
13 action plan, or conducts the removal or remedial action.

14 (4) A person that obtains an approval of a cleanup plan or
15 remedial action plan pursuant to Section 25403.1, or a finding, as
16 specified in subdivision (b), by fraud, negligent or intentional
17 nondisclosure, or misrepresentation, and a person that knows before
18 the approval or determination is obtained or before the person
19 enters into an agreement, acquires the property or provides
20 financing, as specified in subdivision (c), that the approval or
21 determination was obtained by these means.

22 (e) The immunity provided by this section is in addition to any
23 other immunity provided by law to a local agency.

24 (f) This section does not impair any cause of action by a local
25 agency or any other party against the person responsible for the
26 hazardous substance release that is the subject of the removal or
27 remedial action taken by the local agency or other person immune
28 from liability pursuant to this section.

29 (g) This section does not apply to, or limit, alter, or restrict, an
30 action for personal injury or wrongful death.

31 (h) This section does not limit liability of a person described in
32 paragraph (3) or (4) of subdivision (d) for damages under the
33 federal Comprehensive Environmental Response, Compensation,
34 and Liability Act of 1980, as amended (42 U.S.C. Sec. 9601 et
35 seq.).

36 (i) This section does not establish, limit, or affect the liability
37 of a local agency for a release of a hazardous substance that is not
38 investigated or remediated pursuant to this section or Chapter 6.65
39 (commencing with Section 25260).

1 25403.3. The immunity provided for by Section 25403.2 is
2 only conferred if both of the following apply:

3 (a) The action is in accordance with a cleanup plan or remedial
4 action plan prepared by a qualified independent contractor and
5 approved by the department, a regional board, or the designated
6 agency, as appropriate, pursuant to Section 25403.1.

7 (b) The remedial or removal action is found to have been
8 undertaken and properly completed, as specified in subdivision
9 (b) of Section 25403.2.

10 25403.4. The local agency shall reimburse the department or
11 the regional board for costs incurred in reviewing or approving
12 cleanup or remedial action plans pursuant to this chapter.

13 25403.5. (a) Except as otherwise provided in this chapter, if
14 a local agency undertakes action to remedy or remove, or to require
15 others to remedy or remove, including compelling a responsible
16 party through a civil action, to remedy or remove a release of
17 hazardous substance, the responsible party shall be liable to the
18 local agency for the costs incurred in the action. A local agency
19 may not recover the costs of goods and services that were not
20 procured in accordance with procurement procedures, where
21 applicable. The amount of the costs shall include the interest on
22 the costs accrued from the date of expenditure and reasonable
23 attorney's fees and shall be recoverable in a civil action. Interest
24 shall be calculated based on the average annual rate of return on
25 a local agency's investment of surplus funds for the fiscal year in
26 which costs were incurred.

27 (b) The only defenses available to a responsible party shall be
28 the defenses specified in subdivision (b) of Section 25323.5.

29 (c) A local agency may recover any costs incurred to develop
30 and to implement a cleanup plan or remedial action plan approved
31 pursuant to this chapter, to the same extent the department is
32 authorized to recover those costs. The scope and standard of
33 liability for cost recovery pursuant to this section shall be the scope
34 and standard of liability under the federal Comprehensive
35 Environmental Response, Compensation, and Liability Act of
36 1980, as amended (42 U.S.C. Sec. 9601 et seq.) as that act would
37 apply to the department. However, any reference to hazardous
38 substance in that act shall be deemed to refer to hazardous
39 substance as defined in Section 25403.

1 (d) An action for recovery of the costs of a remedy or removal
2 undertaken by a local agency under this section shall be
3 commenced within three years after completion of the remedy or
4 removal.

5 (e) The action to recover costs provided by this section is in
6 addition to, and is not to be construed as restricting, any other
7 cause of action available to a local agency.

8 25403.6. (a) Except as provided in Section 25403.4,
9 notwithstanding any other state law or policy, a local agency that
10 undertakes and completes a remedial action, or otherwise causes
11 a remedial action to be undertaken and completed pursuant to this
12 chapter shall not be liable based on its ownership of property after
13 a release occurred, for any costs that any responsible party for that
14 release incurs to investigate or remediate the release or to
15 compensate others for the effects of that release.

16 (b) Except as provided in Section 25403. 2, this article does not
17 limit the powers of the state board or a regional board to enforce
18 Division 7 (commencing with Section 13000) of the Water Code.

19 24303.7. The Legislature finds and declares that this chapter
20 is the policy successor to the Polanco Redevelopment Act (Article
21 12.5 (commencing with Section 33459) of Part 1 of Chapter 4 of
22 Division 24) and shall be interpreted and implemented consistent
23 with that act.